United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7083

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-7083

JAMES W. HERENDEEN,

Plaintiff-Appellant,

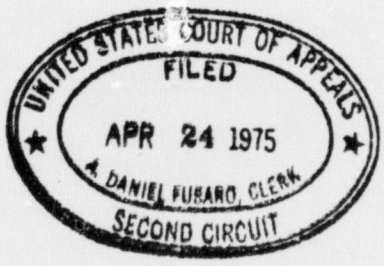
- against -

CHAMPION INTERNATIONAL CORPORATION;
NATIONWIDE PAPERS INCORPORATED; and
CHEMICAL BANK OF NEW YORK TRUST COMPANY;
THE FIFTH THIRD BANK, and the
COMMITTEE, as Administrator of the
Retirement Plan for Salaried Employees
of Certain Subsidiaries of CHAMPION
INTERNATIONAL CORPORATION,

Defendants-Appellees.

BRIEF ON BEHALF OF PLAINTIFF-APPELLANT

On Appeal from the United States District Court
for the Southern District of New York



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PRELIMINARY STATEMENT

This is an appeal from a Judgment of the United States District Court for the Southern District of New York (MacMahon, J.), which dismissed appellant's Amended Complaint pursuant to Rule 12(b) (6) F.R.C.P., for failure to state a claim upon which relief can be granted in that the appellant's cause of action was barred by the doctrine of res judicata.

ISSUE

Did the District Court err in dismissing appellant's Amended Complaint on the basis of the doctrine of res judicata?

STATEMENT OF FACTS

Appellant was an employee of the defendants Champion International Corporation (hereinafter referred to as "Champion") and Nationwide Papers Incorporated (hereinafter referred to as "Nationwide") and their predecessors in interest for a period of over 15 years. In his Amended Complaint herein, plaintiff alleges that as a result of such employment he was entitled to certain vested benefits under what is now known as the Retire-

ment Income Plan for Salaried Employees of Certain Subsidiaries of U.S. Plywood-Champion Papers, Inc. (hereinafter referred to as the "Plan") which benefits have been wrongfully denied to him; first, because the determination of the defendant Committee denying him such rights was erroneous and was arbitrarily and capriciously made and was made either without knowledge of the facts, which they willfully failed and refused to obtain from plaintiff, or in disregard thereof; second, because such determination was a willful violation of Section 5.5 of the Plan which requires the Committee in making any such determination to pursue uniform policies applicable to all employees similarly situated; third, because the Trustees violated and breached their fiduciary duty as Trustees of the Plan by knowingly complying, without objection, with the wrongful cancellation and termination of plaintiff's vested rights in the Plan; and fourth, because all of the defendants acted in concert to reach such erroneous results. Appellant further alleged that the defendants willfully acted in concert thereby to deprive the appellant from engaging in the only occupation in which he has been engaged during most of his adult life. Appellants claim for relief requests that the Court make a declaration as to his rights under the Plan, enjoin the defendants from further actions in derogation of the appellant's rights under the Plan, direct the

Trustees to hold and maintain the necessary assets under the terms and conditions of the Plan for the benefit of the appellant, and grant exemplary damages against the defendants for their wrongful acts.

Prior to the institution of this action, plaintiff had brought suit in the Supreme Court of the State of New York against U.S. Plywood-Champion Papers, Inc., Nationwide Papers Incorporated, Karl R. Bendetsen, Richard W. Lowry, James S. Benton, and Harry C. Lawless, Jr. In his complaint filed therein, appellant alleged, inter alia, that in September 1967, and while appellant was an employee of Champion and/or Nationwide (a subsidiary of Champion), Champion agreed to sell all of the assets and business of Nationwide (except the book trade paper business) to Reinhold-Gould, Inc., and appellant was induced to remain with Nationwide and give up various commercial paper accounts and commissions based upon the defendants' representations that appellant would receive a written contract of employment and would continue to receive all of his benefits as an employee of Champion. The appellant further alleged therein that the defendants had no intention of honoring these representations but that the representations were false and fraudulent and were part of a conspiracy among the defendants designed to induce the plaintiff to give up his

commissions on the commercial paper business and to force him to leave the employ of Nationwide thereby depriving him of his various benefits.

Appellant's Complaint in the Supreme Court of the State of New York was dismissed upon motion of the defendants by Mr. Justice Jacob Markowitz on November 30, 1972. In his decision, reported in the New York Law Journal, Thursday, January 11, 1973, page 16, columns 7-8, Mr. Justice Markowitz held, inter alia, that the appellant's Complaint alleged that he was induced in September 1967, to relinquish and give up the commercial paper accounts he serviced as a salesman for the various defendants, and to forego the commissions on these accounts, on the representations by the defendants that appellant would receive a written contract of employment and that he would continue to receive all his benefits as an employee of Champion or its subsidiaries, and further alleged that, when made, defendants had no intention of honoring these representations and that the representations were false. Mr. Justice Markowitz's opinion stated, in part, that:

> "The basic defect in the complaint is that the representations complained of were promissory in nature. As such, the complaint alleges an agreement to agree, unenforceable until it crystalizes into a binding agreement, rather than an action in fraud.

> The Complaint does not allege that the parties entered into a binding agreement at any time; nor does it allege that at any time there was a meeting of the minds on the essential terms of such an agreement. To the contrary, plaintiffs basic position is that he was promised (false though the promise may have been) that a written agreement would be entered into in the future.
>
> Implicit in such a promise is that no such agreement would be binding until written."

The opinion went on to say:

> "Further, while the complaint does not contain an explicit allegation of the term of the promised employment contract, if the proposed contract was intended to be for more than a one-year period, the oral agreement to grant it, or to employ plaintiff for such a period would be unenforceable as in violation of the Statute of Frauds (Gen. Oblig. Law sec. 5-701(1)). Such an allegation, that is, that the term of plaintiffs proposed contract would be for more than a period of one year, is clearly implicit in a fair reading of the Complaint. Hence, the Complaint is also defective for this reason."

ARGUMENT

The basic function of the doctrine of res judicata is to prevent the parties to an action from relitigating, in a subsequent proceeding, a controversy or issue already de-

termined by a valid judgment. The effect of a judgment as res judicata appears in at least three aspects. These are: 1. merger, by which a judgment for the plaintiff merges his cause of action so that the original cause of action is terminated and a cause of action on the judgment takes its place; 2. bar, by which a judgment for the defendant terminates the original cause of action; and 3. estoppel, by which questions of fact, and perhaps of law, which were actually litigated in the action, are conclusively determined in subsequent actions in which the same questions arise, even though the cause of action may be different.

A formula for the distinction between merger and bar on the one hand and collateral estoppel on the other hand has been made by using the term "claim preclusion" as meaning that further litigation on the claim is prohibited, and the term "issue preclusion" as meaning that further litigation on a specific issue is barred.

The general rule can be stated as follows:

> A judgment rendered upon the merits is a bar (claim preclusion) to a subsequent proceeding between the same parties upon the same claim or cause of suit, not only as to the matter actually determined, but as to every other matter which the parties might have litigated and had decided as incident to or essentially con-

> nected therewith either as a matter of claim or defense; however, when the action is upon a different claim or demand, the former judgment can only operate as a bar (issue preclusion) as against matters actually litigated or questions directly in issue with the former action.

If the first and second action involve the same cause of action, the first is determinative of all issues litigated or which might have been litigated. This is "claim preclusion" - it bars in totality the bringing of the second suit. If the second action is not the same cause of action as the first, but rather a different cause of action, then the parties are collaterally stopped only as to those points actually litigated. This is "issue preclusion". Old Dutch Lands Inc. v. City of New York, 286 N.Y.S. 2nd 86 (N.Y.Sup., 1967).

The courts in determining whether a judgment in one action will preclude a subsequent action (whether the subsequent action may be maintained), place great weight upon the adjudication of particular issues in the earlier action. Thus, where a judgment was entered against a plaintiff in an action on an express contract for labor or services - either because the contract was not proved, there was no agreement on the price to be paid for such services, the contract was void or unenforceable (being, for instance, within the

Statute of Frauds), it has been held that the plaintiff was not precluded from bringing a later action under a quantum meruit theory.

On the other hand, certain determinations of certain issues in the earlier action may have the effect of precluding or limiting the subsequent action. Thus, while generally a plaintiff may bring an action in quantum meruit if in a prior action on an express contract it was determined that the contract was unenforceable, the plaintiff may not do so where it was determined in the earlier action that the services to be performed under the contract were illegal, or that the plaintiff did not perform the services agreed upon, or that he performed them in such a way as to render them valueless.

In Exhibitors Poster Exchange, Inc. v. National Screen Service Corp., 421 F. 2nd 1313, reh. den. 427 F. 2nd 710, cert. den. 400 U.S. 991 (Fifth Circuit, 1970), the Court quoted the classic statement by Mr. Justice Field in Cromwell v. County of Sac, 1877, 94 U.S. 351,24 L.Fd. 195 when he said that in "a second action between the same parties *** upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered".

This distinction between the effect of a judgment on a later suit involving the same claim or cause of action and the effect of a judgment upon a later controversy between the parties based upon a different claim or cause of action was discussed in the matter of Forrest Village Apartments, Inc. v. United States, 371 F. 2nd 500 (U.S.Ct.Cl., 1967), wherein the court held that where the second action between the same parties is on a different cause or demand, the judgment in the prior action operates as an estoppel, not as to matters which might have been litigated and determined, but only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. Matters which were actually litigated and determined in the first proceeding cannot later be relitigated, however, the parties are free to litigate points which were not at issue in the first proceeding even though such points might have been tendered and decided at that time.

A prior judgment does not operate as an estoppel as to immaterial or unessential facts but only as those facts which have such a relation to the issue that their determination was necessary to a determination of that issue. The rule does not prevent the relitigation of a fact litigated and found in the earlier action if it was irrelevant to the issues

therein and was not necessary to the final judgment.

The doctrine of collateral estoppel applies only to issues that are identical in both actions; issues are not identical if the second action involves application of a different legal standard, even though the factual setting of both suits be the same. Peterson v. Clark Leasing Corporation, 451 F. 2nd 1291 (Ninth Circuit, 1971).

The courts have consistently held that causes of action which are distinct and independant, although arising out of the same contract, transaction, or state of facts, may be sued on separately, recovery on one being no bar to subsequent actions on others. See Kernel Kutter Inc. v. Fawcett Publications Inc., 284 F. 2nd 675 (Seventh Circuit, 1960).

Relative to the Statute of Frauds there is some division of authority upon the question whether the statute embodies a rule of substance or a rule of procedure, although the weight of authority is that the statute goes to substance and hence a valid contract is not consummated unless there is a compliance with the statute. The res judicata effect of a judgment on a plea on the statute of frauds would then depend upon the particular rule of the forum rendering judgment. 1B Moore, Federal Practice, paragraph 0.409 (7) at pg. 1041 (2nd ed. 1965).

A judgment is not an estoppel as to all the litigated facts and all the evidence which the one party or the other may choose to introduce upon the trial of the action, however important such evidence may have been. The estoppel extends to the material facts which are in issue between the parties to the action, and to such as necessarily bear upon, control and are essential to the ajudication made. The judgment is final only as to such facts as are litigated and decided, which have such a relation to the issue that their determination was necessary to the determination of that issue. And, if there be any uncertainty, the prior judgment is not conclusive. In re Balsam's Trust, 296 N.Y.S. 2nd 969 (N.Y.Sup., 1968).

In Smith v. Kirkpatrick, 305 N.Y. 66, 111 N.E. 2nd 209, reh. den. 305 N.Y. 926, 114 N.E. 2nd 477, the plaintiff originally instituted an action against the defendant seeking recovery of monies allegedly due him under a contract of employment. The defendant denied the existence of the agreement and the complaint was dismissed for the reason that the agreement pleaded therein did not comply with the Statute of Frauds. Thereupon plaintiff amended his complaint alleging, basically, the establishment of a partnership, also alleging an oral agreement of joint venture, and demanding an account-

ing. This amended complaint was dismissed as the plaintiff failed to establish his causes of action. The plaintiff took no appeal but instituted a third action seeking to recover the reasonable value of services rendered by him to the defendant (quantum meruit). The court held that the two actions brought by the plaintiff involved different "rights" and "wrongs". The causes of action were different and distinct and the rights and interests established by the first ajudication would not be impaired by a recovery, if any, in the second action. The court further held that:

> "Plaintiffs failure to recover on the causes stated in his second complaint was due to the fact that he did not establish the existence of the arrangements therein alleged. The decision was not that plaintiff failed to prove compliance with an existing agreement. It was not decided that no services were rendered to defendant with his consent, nor that the services rendered conferred no benefit upon the defendant - those matters are still open and it is those which plaintiff now seeks to prove."

In order to determine whether these appellees may properly invoke the defense of res judicata, it becomes necessary to compare the Complaint which was dismissed by the New York State Court with the Amended Complaint filed herein. The first question to be answered is whether the two suits involve the same claim or demand. In the State Court Complaint

appellant alleged the breach of an oral agreement by which the appellee Nationwide promised and represented to appellant that he would be provided with a written contract of employment and would continue to receive all of his benefits as an employee of Champion, and, further alleged that the representations made by this appellee in order to induce appellant to accept this oral agreement were false and fraudulent and were part of a conspiracy among the defendants therein designed to induce this appellant to give up various commissions and to drive him from his employment.

The appellant's Amended Complaint filed herein, however, sets forth a distinct and separate cause of action in that the appellant alleges that as an employee of appellee Nationwide and Champion he became entitled to certain vested benefits under what is now known as the Retirement Income Plan for Salaried Employees of Certain Subsidiaries of U.S. Plywood-Champion Papers, Inc.; that these benefits were wrongfully denied to him; that the Trustees of the Plan violated and breached their fiduciary duty to the appellant; and that the appellees acted in concert to deprive the appellant from engaging in his occupation.

In summary, the thrust of the State Court Complaint is the breach of an oral agreement to provide this appellant

with an employment contract. The subject matter of the Amended Complaint filed herein, is quite the opposite. Here the appellant alleges that he was employed by Champion and its subsidiaries since 1962. As a consideration for his continuing in said employment, he was promised certain benefits. These benefits are reduced to a writing and are contained in the Plan previously discussed. The appellant thereafter alleges, inter alia, that the various appellees failed to abide by the terms of that Plan and are therefore subject to damages for its breach.

If there is any doubt at all as to whether the same cause of action is alleged in both complaints, this doubt should be conclusively resolved by reference to the opinion of Mr. Justice Markowitz in dismissing appellant's State Court Complaint. Referring to that opinion, we find that the only issues decided by Mr. Justice Markowitz were that appellant's State Court Complaint alleged an agreement to agree and not a binding contract and even if there was an oral agreement its enforceability was barred by the Statute of Frauds. Clearly these issues decided by Mr. Justice Markowitz are not issues in the instant litigation. If these issues are or become collaterally involved in the instant litigation, the cases cited herein clearly establish that the appellant would be

bound by Mr. Justice Markowitz's final determination of those issues.

Additionally, a prior judgment generally bars subsequent suits on the same cause of action and renders the judgment conclusive only as between the parties to the prior case. There are several exceptions to this general rule: 1. The non-party was in privity with the actual party to the first litigation (the non-party is so identified in interest with a party to the former litigation that he represents the same legal right in respect to the subject matter). 2. He controlled the earlier action. 3. His interests were represented by a party to the prior action. 4. He is the successor in interest to prior parties or their privies. Mpiliris v. Hellenic Lines, Limited, 323 F. Supp. 865, affirmed 440 F. 2nd 1163 (D.C.Tex., 1970).

Generally, privity means a mutual or successive relationship to the same rights of property, or such an identification in interest of one person with another as to represent the same legal rights, and the term "privy" when applied to a judgment or decree refers to one whose interest has been legally represented at the trial. Privity does not arise from the mere fact that persons as litigants in different actions are interested in proving or disproving the same facts. One

whose interest is almost identical with that of a party, but who does not claim through him, is not in privity with him. 50 C.J.S. Judgments Section 788.

One must keep in mind that in the action in the State Court, appellant was not seeking to enforce the terms of the aforesaid Plan but an oral agreement between various parties therein. In the instant matter, however, plaintiff is seeking to enforce that Plan. In his claim for relief herein, plaintiff, in effect, is requesting a declaratory judgment as to his rights in the Plan. A declaratory judgment serves a legitimate purpose only when all persons who may be affected thereby and who may question in a court the existence and scope of the rights declared are parties to the action and have an opportunity to be heard. A court may, and ordinarily must, refuse to render a declaratory judgment in the absence of such parties. As to persons who are not parties, a declaratory judgment would be a mere academic pronouncement without juridical consequence, but which might be embarrassing if an attempt is made thereafter to enforce these rights in a legal proceeding to which they are parties. Manhattan Storage & Warehouse Company v. Movers & Warehousemen's Association of Greater New York, 289 N.Y. 82, 43 N.E. 2nd 820 (C. of A., 1942). It is therefore submitted that the Trustees and the Committee are indis-

pensable parties to the instant litigation. Without their presence in this litigation, any decision in favor of the appellant would be a "mere academic pronouncement".

Additionally, when the defense of res judicata is interposed, the burden of proof is clearly upon the moving party and the defense should not be lightly sustained. Though principles of res judicata should not be frugally applied, a reasonable doubt as to what was decided in the first action should preclude the drastic remedy of foreclosing a party from litigating an essential issue. McNellis v. First Federal Savings & Loan Association of Rochester New York, 364 F. 2nd 251 (Second Circuit, 1966). Res judicata is a sound and salutary principle that deserves to be respected and applied. But at times there is considerable truth in the observation that res judicata renders white black, the crooked straight. 1B Moore, Federal Practice, paragraph 0.405 (12) at pg. 787, (2nd ed. 1965).

When the issue of res judicata is properly raised in a suit, the prior judgment must be scrutinized in order to determine whether the cause of action upon which it was rendered was the same as that presently asserted. What is a cause of action for the purpose of res judicata cannot be defined with precision. Clearly mere repitition should not be tolerated, whether this is sought through variation in theory

or by pleading new facts. The principle of repose which underlines res judicata, however, deserves a broader and kindlier application than that needed merely to quell a litigious litigant. At the same time application should be so tempered that litigants receive at least one fair day in court. 1B Moore, Federal Practice, paragraph 0.410 (1) at pg. 1155 (2nd ed. 1965).

In Exhibitors Poster Exchange, Inc. v. National Screen Service Corp., (supra), the court held:

> "The defendants pressed these doctrines on the District Court as though they were to be used as clubs to accomplish the policy imbedded in them: the prevention of a repetitive litigation. The doctrines must be used, however, not as clubs but as fine instruments that protect the litigant's right to a hearing as well as his adversary and the courts from repetitive litigation. In addition, it must be remembered that the use of these doctrines can cloak a party in perpetual immunity and thus possibly protect conduct lasting long past the prior judgment - conduct that the law may grow to abhor."

Further, the burden of proof is upon the moving party to sustain their plea of res judicata and to show clearly that the question in issue was litigated and determined in the former action. If there is any uncertainty, the prior judgment is not conclusive. City Bank Farmers Trust

Company v. Macfadden, 216 N.Y.S. 2nd 215, re-argument denied 219 N.Y.S. 2nd 943, affirmed 239 N.Y.S. 2nd 680, cert. den. 375 U.S. 823. McNellis v. First Federal Savings & Loan Association of Rochester New York, (supra).

The party claiming the estoppel must show that the particular question at issue was determined on the merits in the prior litigation. This may cause some difficulty in cases where there were two defenses to the prior action, only one of which was on the merits. In such instances the party invoking the estoppel has the burden of proving that the issue raised in the second suit was determined on its merits by the first judgment. 1B Moore, Federal Practice, paragraph 0.408 (1) at pg. 955. And the doctrine is technical in nature and one who asserts it cannot complain if the proceedings upon which he relies are subjected to technical scrutiny. Id. at paragraph 0.410 (1), at pg. 1155, note 20.

In conclusion, the proper consideration of the propriety of sustaining the defense of res judicata requires the evaluation of the answers which must be given to the following questions: a. Do the two suits involve the same claim or demand? b. Even though there be identity of subject matter, is there identity of cause of action, that is, identity in the investitive facts which create the right of

action asserted in each proceeding or suit? c. Is the same evidence necessary to sustain each cause of action? d. Did the claims or rights of action asserted by the appellant in both actions vest or accrue at the same time? e. Are the parties to the prior action identical and/or in privity with the parties to the second action? f. Has the moving party sustained its burden of proof by showing clearly that the issues in the former action were litigated and determined and are dispositive of the issues in the later action?

It is submitted that the trial court erred in not answering each and every question contained in the preceding paragraph in the negative.

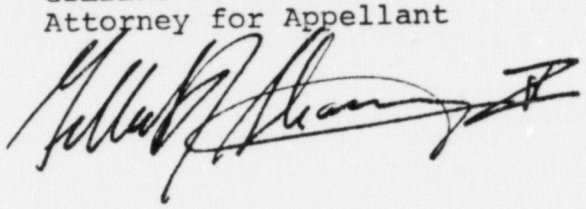
CONCLUSION

The Judgment appealed from should be reversed with costs.

April 20, 1975.

Respectfully submitted,

GILBERT J. STROMING, II
Attorney for Appellant



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JAMES W. HERENDEEN, Plaintiff-Appellant, - against - CHAMPION INTERNATIONAL CORPORATION; NATIONWIDE PAPERS INCORPORATED; and CHEMICAL BANK OF NEW YORK TRUST CO; THE FIFTH THIRD BANK, and the COMMITTEE, as Administrator of the Retirement Plan for Salaried Employees of Certain Subsidiaries of CHAMPION INTERNATIONAL CORPORATION, Defendants-Appellees.	UNITED STATES COURT OF *Court* APPEALS - 2ND CIRCUIT *Division* *Docket #* 75-7083 On Appeal from the United States District Court for the Southern District of New York Sat Below:

CERTIFICATION

On April 23 *1975, I, the undersigned, being of full age did deliver to Lawyers Service or mail by regular mail for service on:*

Clerk of the United STates Court of Appelas For the 2nd Circuit
and: Foley Square, New York, New York

Kronish, Lieb, Swainswit, Weiner and Hellman, Esqs., 1345 Avenue of the Americas, New York, New York 10019

25 *copies of* Brief and ten (10) copies of Appendix (Joint) *to the Clerk of the* United States District Court For The Second Circuit
2 *same to each of the following:*

Kronish, Lieb, Swainswit, Weiner and Hellman, Esqs,

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

DATED: April 23, 1975

/s/ Mary Sampieri